C-SPAN
A PUBLIC SERVICE CREATED
BY AMERICA'S CABLE
TELEVISION COMPANIES

DOCKET FILE COPY ORIGINAL

June 8, 2001

Ms. Magalie Roman Salas
Secretary, FCC
Office of the Secretary
445-12th St. SW
Room TW-B204
Washington, DC 20554

RE: Comments of the C-SPAN Networks on
CS Docket No. 98-120
CS Docket No. 00-96
CS Docket No. 00-2

Dear Ms. Roman Salas;

Please find enclosed 12 copies of Comments of the C-SPAN Networks. We have submitted 4 copies for each Commissioner to receive a personal copy and 2 additional copies of each docket.

Please contact me at (202) 626-7959 if you have any questions.

Sincerely,

Vanessa Melius

Vanessa Melius
Executive Assistant

No. of Copies rec'd 0+10
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999:	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2

COMMENTS of the C-SPAN NETWORKS
(National Cable Satellite Corporation)

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June 11, 2001

COMMENTS of the C-SPAN NETWORKS
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COMMENTS of the C-SPAN NETWORKS
(National Cable Satellite Corporation)

I. INTRODUCTION

The C-SPAN Networks[1] file these comments to support the Federal Communication Commission's tentative conclusion made earlier this year[2] that a so-called digital must carry

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[1] The C-SPAN Networks are full time satellite delivered public affairs television programming services available primarily via cable television, and devoted entirely to information and public affairs, including the live gavel-to-gavel coverage of the proceedings of the U.S. House of Representatives (on C-SPAN), the U.S. Senate (on C-SPAN2) and a variety of other events at public fora around the country and the world. The C-SPAN Networks also include C-SPAN3, a fulltime digital programming service launched in January of 2001. The C-SPAN Networks are produced and distributed by the National Cable Satellite Corporation ("NCSC"), a non-profit educational corporation in the District of Columbia. NCSC is exempt from federal income tax pursuant to I.R.C. Sec. 501(c)(3).

[2] This tentative conclusion was made in the Commission's *Further Notice of Proposed Rulemaking*, Carriage of Digital Television Stations, 58 Fed. Reg. 16524 (Mar. 26, 2001) ("*Further Notice*"). These Comments are filed in response to the *Further Notice.*

rule (or, dual must carry rule) would burden First Amendment interests substantially more than is necessary to further the government's interests underlying the statutory must-carry requirements of the Communications Act.

Not only do we support the Commission's tentative conclusions about the sanctity of our free speech rights as a programmer, we also urge the Commission once and for all to purge from its proceedings any possibility that dual must carry could rear its ugly head again. This it must do because dual must carry is fundamentally unfair.

II. THE PASSAGE OF TIME HAS NOT WEAKENED THE CONSTITUTIONAL ARGUMENTS AGAINST DUAL MUST CARRY, BUT IT *HAS* REVEALED DUAL MUST CARRY TO BE AS UNNECESSARY AS IT IS UNFAIR.

The First Amendment has not changed since the Supreme Court clearly delineated cable programmers' rights in the *Turner* cases.[3] It has not changed since the Commission issued its first *Notice of Proposed Rulemaking* on digital/dual must carry in July of 1998; nor has it changed since the Commission issued its *Further Notice*. Thus, we direct the Commission's attention once again to our Comments of 1998 in which we argued that if *analog* must carry could survive constitutional scrutiny by only the most narrow margin in 1997, then *dual* must carry, as a vastly more intrusive infringement on our rights and on the rights of cable operators, had absolutely no chance to do the same a year later, or ever.[4] Dual must carry would not survive a constitutional challenge today because absolutely nothing of legal significance has changed in the communications marketplace to overcome its overbearing unfairness to the First Amendment rights of programmers such as the C-SPAN

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[3] *See: Turner Broadcasting Systems, Inc., v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting Systems, Inc. v. FCC*, 117 S.Ct. 1174 (1997) (*Turner II*).

[4] *See:* Comments of the C-SPAN Networks in CS Docket No. 98-120 (1998).

Networks.

In fact, the lesson to be learned from recent trends in the communications market is that in addition to being unfair, dual must carry is utterly unnecessary if its purpose is to do anything good for the television viewing public. And, it is completely irrelevant to achieving any legitimate governmental interest that meets the requirements set out in the *Turner* cases. Nevertheless, even if the Commission were to accept (which it shouldn't) the broadcast industry's most recent claim that the government now has a legitimate interest in speeding up the overall transition from analog to digital technology, it should reject a dual must carry rule as a potential solution. The reason consumers are not rushing out to buy expensive HDTV sets is not because they are not able to watch the broadcasters' current digital offerings on their cable systems. It is because for the most part, those offerings either do not yet exist or are duplicative of their analog equivalents, and HDTV sets still cost too much for most people. The real incentive for consumers to invest in digital television will be compelling digital-only or high definition programming that they can not get any other way. No amount of government regulation, including a dual must carry rule, is going to alter that unalterable characteristic of the marketplace.

III. THE MYTH OF AMPLE CAPACITY: EVEN WITHOUT A DUAL MUST CARRY REQUIREMENT IN PLACE TODAY, PROGRAMMERS ARE BEING TOLD THERE IS NO ROOM FOR THEM ON EVEN THE REBUILT SYSTEMS.

In the *Further Notice* the Commission expressed particular interest in receiving more information about the channel capacity of cable systems around the country. No doubt detailed information on that point will be forthcoming from the cable operators participating in this proceeding. As that detailed information is likely to demonstrate, our experience with

the recently-launched C-SPAN3 gives lie to the myth that cable operators can easily accommodate all or even most of those who seek digital distribution.

Our efforts to launch a version of C-SPAN3 have been frustrated by government regulation of cable capacity for nearly a decade, and it continues today. Not long after the rules implementing the 1992 Cable Act[5] were known, we and other programmers were then faced with the triple whammy of analog must carry, retransmission consent and rate reregulation. It caused us to shelve our plans to launch an array of public affairs services to be known then as C-SPAN3, C-SPAN4 and C-SPAN5 because investment in cable systems slowed down at the same time broadcast stations were given first priority to limited channel capacity.[6] History would be repeating itself were dual must carry to become effective.

Even without a dual must carry obligation we are finding that our efforts to achieve wide distribution of the recently launched C-SPAN3 as a digital service is being frustrated by capacity limits. The fulltime public affairs service featuring live event coverage was launched on January 22, 2001 and is now available in approximately 3.3 million households, but its growth has been slow because of strong competition from other programmers for system capacity. As an example, we have been told by AT&T Broadband that its HITS satellite distribution system, which is the sole means of distributing most digital programming services to AT&T Broadband's 15.9 million cable subscribers, is already nearly fully committed. The result is that as of this writing, we have been unable to get a commitment from AT&T Broadband for digital distribution of C-SPAN3 on their systems, and limited

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[5] 47 U.S.C. Secs. 522 *et seq.* (1992 Cable Act).

[6] *See:* Comments of C-SPAN and C-SPAN2, MM Docket No. 92-266.

capacity is the reason given to us. If dual must carry becomes law, not only will C-SPAN3 certainly be left out (again)[7], C-SPAN and C-SPAN2 will also face carriage pressures.

IV. CONCLUSION

The Commission's tentative conclusion about the unconstitutionality of dual must carry is correct. Moreover, the idea that dual must carry can be justified as a means to speed up the digital transition is doubly flawed: it won't have any effect on the pace of the transition, and even if it did, speeding up the transition is not a constitutionally valid reason to violate the C-SPAN Networks' First Amendment rights. Finally, technology does not solve the trade off that dual must carry forces on cable operators and cable programmers. As our most recent experiences in trying to achieve carriage for new programming services demonstrates, the industry is already reaching the limits of its capacity. Dual must carry would immediately cause that capacity to filled, and would unfairly squeeze out valuable

[7] The first version of C-SPAN3 was shelved after full implementation of the 1992 Cable Act. Then, based on available analog and digital capacity, we launched another version known as C-SPAN Extra in the Fall of 1997. C-SPAN Extra was a daytime-only service for distribution on either analog or digital tiers. The most recent version of C-SPAN3, a fully digital service, replaced C-SPAN Extra in January of this year.

programming services such as ours that currently provide value to American television viewers.

Respectfully submitted,

THE C-SPAN NETWORKS

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June 11, 2001